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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE AND BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Solicitor General, on behalf of the United States, moves for leave to intervene as a party in this case.

1. On June 28, 1990, this Court granted the petition for a writ of certiorari. 110 S. Ct. 3269. The petition presents two questions for review: (1) "Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 when the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims"; and (2) "Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court."

2. Because the constitutionality of an Act of Congress affecting the public interest is drawn in question in this

case, cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the United States may intervene as of right under 28 U.S.C. 2403(a).* That Section applies "[i]n any action, suit or proceeding in a court of the United States"; 28 U.S.C. 451 defines "court of the United States" to include this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.16, at 341 (6th ed. 1986) (28 U.S.C. 2403 "applies to the Supreme Court as well as the lower federal courts"). Section 2403(a) by its terms accords the United States "all the rights of a party."

3. To effectuate the United States' right to intervene, 28 U.S.C. 2403(a) further provides that the Attorney General be notified of "any" case wherein "the constitutionality of any Act of Congress affecting the public interest is drawn in question." Accordingly, Federal Rule of Appellate Procedure 44 requires a party challenging the constitutionality of an Act of Congress to notify the court of appeals so that its Clerk can notify the Attorney General. Rule 29.4(b) of the Rules of this Court likewise requires that in any proceeding wherein the constitutionality of an Act of Congress is drawn in question, and the United States is not a party, "the initial pleading, motion, or paper filed in this court shall recite that

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* This Section provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. 2403(a).

28 U.S.C. § 2403(a) may be applicable." That Rule further provides that in proceedings from any court of the United States, "the initial pleading, motion, or paper shall also state whether or not that court, pursuant to 28 U.S.C. § 2403(a), has certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question."

Notwithstanding these rules, neither party provided the requisite notice, and no certification was provided by the clerk of the court of appeals below. The Solicitor General did not learn that the constitutionality of an Act of Congress was drawn in question in this case until the Court granted certiorari on June 28, 1990. Consequently, the United States had no opportunity to participate in this case before it reached this Court.

4. The United States has a longstanding and significant interest in the Court's resolution of the questions presented in this case. In 1978, after almost ten years of study and investigation, Congress enacted the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (repealed). The 1978 Act represented the first comprehensive revision of the bankruptcy system since 1898. Among other purposes, it was designed to reduce the serious delays in bankruptcy proceedings caused by the crowded dockets of non-bankruptcy courts.

This Court held the 1978 Act's grant of jurisdiction to bankruptcy courts unconstitutional in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In response, Congress enacted the legislation challenged in this case—the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Congress, in the 1984 Act, intended to conform the bankruptcy system to the requirements of Article III as determined by this Court. The United States has a profound interest in whether the revised bankruptcy system is found by this Court to comport with constitutional requirements.

5. On consideration of the substantial federal interest in the constitutional question in this case, and the government's statutory authority to intervene as of right with "all the rights of a party," 28 U.S.C. 2403(a), we request the Court to grant the United States leave to intervene. See *Glidden Co.* v. *Zdanok*, 368 U.S. 814, 885 (1961); *International Assoc. of Machinists* v. *Street*, 363 U.S. 825 (1960). See generally R. Stern, E. Gressman & S. Shapiro, *supra*, § 6.16, at 341; *id.* § 6.33, at 380 & n.94.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1990

QUESTIONS PRESENTED

1. Whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A).

2. Whether adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment.

PARTIES TO THE PROCEEDING

In addition to the captioned parties, the Light Manufacturing Co., Inc., Aimwell Products, Inc., Ben Cooper Sales Corp., Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., are parties to the proceedings.

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN INTERVENTION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A22, is reported at 896 F.2d 1394. The opinions of the district court, Pet. App. A23-A28; J.A. 183-188, and the bankruptcy court, Pet. App. A29-A30; J.A. A112-A113, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 8, 1990, and was granted on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 151, 157, 1334, and 1411 of Title 28 of the United States Code are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Respondent Ben Cooper, Inc., is an importer and manufacturer of costumes and toys. Petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. are an insurance company and an insurance brokerage corporation, respectively. After respondent filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, petitioners contracted with the bankruptcy estate (through respondent, as the debtor-in-possession) to insure the *res* of the estate. A fire at one of the estate's facilities led to a dispute over the insurance contract, and the insurance company brought a declaratory judgment action in New York state court to rescind the contract.

As we shall describe more fully below, the bankruptcy court, at respondent's behest, stayed the state court proceedings. Respondent then filed its own adversary proceeding in the bankruptcy court seeking payment of its insurance claim and punitive damages. For their part, petitioners urged the district court to withdraw the proceeding from the bankruptcy court under 28 U.S.C. 157(d) on the grounds that it was not a core proceeding and was triable to a jury as of right. The district court agreed and withdrew the proceeding. In addition, the district court abstained in favor of the state court litigation and dissolved the bankruptcy court's injunction staying that litigation. The court of appeals reversed, holding that the proceedings were core and that the bankruptcy court could preside over a jury trial.

1. This matter commenced in April 1988 when respondent filed its petition for reorganization in the United States District Court for the Southern District of New York. In October 1988, respondent—as the debtor-in-possession of the bankruptcy estate—purchased a policy to insure the estate's commercial facilities.[1] The

[1] The estate was being administered by the debtor-in-possession, as opposed to a trustee. See 11 U.S.C. 1107. Accordingly, peti-

insurance was required under the reorganization plan then pending in the bankruptcy court. Petitioners were aware that the policy was sold to a debtor-in-possession, acting on behalf of a bankruptcy estate, and that the policy's subject matter constituted assets of that estate. Pet. App. A4, A12; see note 1, *supra*.

On January 6, 1989, a fire damaged one of the facilities of the bankruptcy estate. The insurer refused to pay the claim tendered by respondent (as debtor-in-possession) on behalf of the estate. The insurer contended that the policy was invalid because the application had misrepresented the facility to be a warehouse when in fact it was a manufacturing plant. The insurer also asserted that it was not liable on the policy because the claim exaggerated the fire damage. Pet. App. A4-A5.

Subsequently, on April 4, 1989, the bankruptcy court confirmed the reorganization plan. Pet. App. A4. On that date, title to the estate's property was transferred from the estate to respondent. See 11 U.S.C. 541(a), 1141.

On April 18, 1989, the insurer filed an action in New York state court to declare the policy invalid. On May 9, 1989, respondent obtained an order from the bankruptcy court staying the state court proceedings. Soon thereafter, respondent instituted an adversary proceeding in bankruptcy court claiming that the insurer was liable for payment of the insurance claim and that the insurance brokers were liable for negligence if the policy was held void. Petitioners opposed the bankruptcy court's jurisdiction, demanded a jury trial, and moved the district court to withdraw the proceedings. Pet. App. A5-A6.

2. The district court remanded the proceeding to the bankruptcy court and instructed it to determine whether it was "core" or "non-core" under 28 U.S.C. 157. On

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tioners corresponded with and received checks for the insurance premiums from "Ben Cooper, Inc., D.I.P."

remand, the bankruptcy court determined that the proceeding was core. Pet. App. A29-A30; J.A. A112. Then, on petitioners' motion, the district court reexamined the matter and held that the proceeding was not core. Pet. App. A24-A25; J.A. A184-A185. The district court further held that petitioners were entitled to a jury trial. Pet. App. A25-A26; J.A. A185. Believing that bankruptcy courts could not conduct jury trials in non-core proceedings, Pet. App. A25-A26; J.A. A185-A186, the district court withdrew the reference to the bankruptcy court:

> The necessity of preserving [petitioners'] right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d).

Pet. App. A26; J.A. A186; accord Pet. App. A25; J.A. A185. Rather than try the case itself, the district court abstained under 28 U.S.C. 1334(c)(1) and (2) in favor of the action in New York state court and dissolved the bankruptcy court's injunction staying those actions. Pet. App. A26-A28; J.A. A186-A188.

3. Respondent appealed to the Second Circuit, which reversed. Pet. App. A1-A22. The court of appeals held that (1) the dispute was a core bankruptcy proceeding; (2) petitioners had a right to a jury trial; (3) the statute authorizes jury trials in bankruptcy courts; and (4) neither Article III nor the Seventh Amendment bars bankruptcy judges from presiding over such trials. First, the court of appeals held that the proceeding was within the core jurisdiction of the bankruptcy court because it was a "matter[] concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Pet. App. A7. The court relied on several factors in determining that this insurance contract dispute was a core matter: the dispute involves a post-petition contract made with the debtor-in-possession, who serves as an officer of the bankruptcy court; the facility insured was an asset of the estate; insurance of the assets of the estate was part of

the reorganization plan; and petitioners were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. Pet. App. A12. The court of appeals reasoned that Congress intended bankruptcy courts to adjudicate such disputes as core matters, despite the fact that they implicate state law, because they lie "at the heart of the administration of the bankrupt estate." Pet. App. A10. The court of appeals concluded that it "is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." Pet. App. A12.

Second, the court of appeals held that petitioners are entitled to a jury trial because their claims are legal in nature. Pet. App. A17-A18. The court of appeals explained that respondent's dispute with the insurer alleged a breach of contract, while its claims against the insurance brokers alleged negligence and malpractice. *Ibid.* These legal claims for money damages are, the court stated, triable to a jury under the Seventh Amendment. *Ibid.*

Third, the court of appeals held that bankruptcy courts have statutory authority to conduct jury trials in core proceedings. That holding rested on the combined effect of "two separate but related provisions." Pet. App. A19. The first provision, 28 U.S.C. 151, provides that bankruptcy courts "may exercise the authority conferred under this chapter with respect to any action." The second provision, 28 U.S.C. 157(b), states that bankruptcy courts have authority to conduct trials and issue final orders in core proceedings. Reading the two provisions together, the court of appeals reasoned that Congress intended bankruptcy courts to enter final orders in all core proceedings, even those triable to a jury. Pet. App. A19.

Finally, the court of appeals concluded that this authority does not violate Article III of the Constitution or the Seventh Amendment. The court of appeals held that

jury trials in bankruptcy court do not violate the Seventh Amendment, because no facts found by the jury would be reexamined by the district court, which exercises only appellate review over judgments in core bankruptcy proceedings. Pet. App. A20-A21. Nor would jury trials in bankruptcy court violate Article III, because "[i]f bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22. Accordingly, the court of appeals reversed the district court's judgment and remanded the case to the bankruptcy court. Pet. App. A4.

Petitioners sought review by this Court, citing a conflict between the decision below and a recent decision of the Eighth Circuit holding that bankruptcy courts have no statutory authority to conduct jury trials, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990).[2] On June 28, 1990, this Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The district court's order withdrawing the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided. Standing alone, the order withdrawing the reference to the bankruptcy court is interlocutory and not an appealable "final decision" under either 28 U.S.C. 158(d) or 28 U.S.C. 1291. Because the district court abstained in favor of related state court litigation under 28 U.S.C. 1334(c)(1) and (2), however, and because the abstention decision is an appealable final judgment, the interlocutory order withdrawing the reference "merged" into and became reviewable as part of the final judgment.

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[2] The Eighth Circuit has recently been joined by the Tenth Circuit. See *In re Kaiser Steel Corp.*, No. 90-1013 (Aug. 10, 1990).

By abstaining in favor of the state court litigation, however, the district court brought into play the statutory bar to review of abstention decisions contained in 28 U.S.C. 1334(c)(2). In our view, the bar to review of abstention decisions should not be read to include the antecedent determination whether the case is merely "related to" a case under title 11. Since the instant proceeding is not merely "related to" but rather "arises in" a case under title 11, abstention under Section 1334 (c)(2) was not appropriate and the review bar is inapplicable. If this Court instead determines that the present proceeding is only "related to" a case under title 11, then the review bar applies and the Court should vacate the court of appeals' decision and remand with instructions to dismiss the appeal for want of jurisdiction.

II. Post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157 (b)(2)(A). That Section designates as core bankruptcy proceedings "matters concerning the administration of the estate." Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets falls within the literal wording of Section 157 (b)(2)(A). Moreover, the efforts of a trustee or debtor-in-possession to protect the *res* of the estate by insuring its assets fit squarely within long-accepted notions of estate administration.

Section 157(b)(2)(A) cannot be read to include actions on pre-petition contracts, because until a petition is filed in bankruptcy court there is no estate to administer. For this reason, actions to collect on pre-petition accounts receivable like those at issue in *Marathon* cannot be core proceedings under that Section. But where, as here, parties contract with the debtor-in-possession, who is an officer of the bankruptcy court, to insure the *res* of the bankruptcy estate, a dispute over the contract emerging during the pendency of the bankruptcy case is a core proceeding under 28 U.S.C. 157(b)(2)(A).

III. Adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment. The Court need not decide whether jury trials may proceed in bankruptcy court because petitioners are not entitled to a jury trial. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court and waived any right they may have had to a jury trial. Alternatively, post-petition contractual disputes involving estate administration are so closely intertwined with the public regulatory scheme governing bankruptcies that they are matters of "public right" not triable to a jury.

If petitioners are entitled to a jury trial, that trial should take place in district court because the 1984 Bankruptcy Act does not authorize jury trials in bankruptcy court. Congress deleted the provisions of the 1978 Act authorizing jury trials in bankruptcy court when it enacted the 1984 Act, and Congress's broader purpose in the latter legislation was to curtail the independent powers of bankruptcy judges, one of which was the power to preside over jury trials.

Although Congress did not authorize jury trials in bankruptcy court in the 1984 Act, neither Article III nor the Seventh Amendment prevent it from doing so. If bankruptcy judges can conduct bench trials consistent with Article III—which we believe they can—then the presence of a jury weakens rather than strengthens the Article III challenge. Furthermore, an Article III judge need not preside over a jury trial to comply with the Seventh Amendment.

ARGUMENT

I. THE DISTRICT COURT'S WITHDRAWAL OF THE REFERENCE TO THE BANKRUPTCY COURT IS PROPERLY BEFORE THIS COURT

Although neither the parties nor the court of appeals raised the issue, a substantial question exists concerning this Court's jurisdiction. In our view, the district court's withdrawal of the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided.

1. Under 28 U.S.C. 1254, this Court has jurisdiction to review a case from a federal court of appeals by writ of certiorari, provided that the case is "in the court[] of appeals." In other words, the court of appeals must have jurisdiction over a case for this Court to have jurisdiction by writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 & n.21 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974).

If the court of appeals lacks jurisdiction to hear an appeal, this Court also lacks jurisdiction to reach the merits. Under those circumstances, the Court has jurisdiction only to vacate the judgment of the court of appeals and remand with instructions to dismiss the appeal for want of jurisdiction. See, *e.g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541, 549 (1986).

2. 28 U.S.C. 158(d) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by a district court or bankruptcy appellate panel on appeal from a bankruptcy court. More generally, 28 U.S.C. 1291 vests jurisdiction in the courts of appeals over "appeals from all final decisions of the district courts of the United States," except where direct review may be sought in the Supreme Court.

The order that respondent appealed to the Second Circuit is ordinarily not a final decision within the meaning

of 28 U.S.C. 158(d) or 28 U.S.C. 1291. The district court entered three orders: it withdrew the reference of the case to the bankruptcy court, it abstained in favor of the state court action, and it dissolved the bankruptcy court's injunction staying that state court litigation. Pet. App. A26-A28; J.A. A186-A128. Respondent appealed only the first of those orders—the district court's withdrawal of the reference to the bankruptcy court. Respondent explicitly said it was not appealing from either the district court's abstention in favor of the state court litigation or from the order dissolving the stay of those proceedings. See Pet. App. A7 ("Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction"); Resp. C.A. Br. 6 & n.* (Cooper appeals the withdrawal of reference "pursuant to 28 U.S.C. § 158(d)"; the abstention decision is "not part of this appeal").

Respondent's tack in the court of appeals raises a serious jurisdictional issue. Indeed, every circuit to have considered the question has concluded that withdrawals of references are not themselves final decisions appealable under either 28 U.S.C. 158(d) or 28 U.S.C. 1291.[3]

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[3] The bankruptcy appeals provision, 28 U.S.C. 158(d), does not by its terms apply to withdrawals of references or any other orders originating with the district court. Section 158(d) confers jurisdiction of the courts of appeals only of final decisions "entered under subsections (a) and (b) of this section." Subsection (b) is not applicable to withdrawals of references or any other orders originating with the district court, because it pertains only to decisions by bankruptcy appellate panels composed of bankruptcy judges. Subsection (a) is also inapplicable, because a district court's decision to withdraw a reference (or any other order originating with the district court) is not a decision of an "appeal[] * * * [or] interlocutory order[] of [a] bankruptcy judge[]." Under 28 U.S.C. 157(d), only the district court has authority to withdraw a reference. Because withdrawals of references necessarily originate in the district court, and not in an appealable or interlocutory order of the bankruptcy court, it follows that the court of appeals had no jurisdiction under 28 U.S.C. 158(d), as respondent contended,

See *In re Powelson*, 878 F.2d 976, 979 (7th Cir. 1989); *In re Chateaugay Corp.*, 826 F.2d 1177, 1179-1180 (2d Cir. 1987); *In re Moens*, 800 F.2d 173, 175-176 (7th Cir. 1986); *In re Kemble*, 776 F.2d 802, 805-806 (9th Cir. 1985); *In re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) (per curiam); *In re Dalton*, 733 F.2d 710, 714-715 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185 (1985). Nor are withdrawals of references appealable under the collateral order doctrine, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because they are reviewable on appeal from a final judgment. See *In re Powelson*, 878 F.2d at 981; *In re Chateaugay Corp.*, 826 F.2d at 1180; *In re Moens*, 800 F.2d at 176; *In re Kemble*, 776 F.2d at 806; *In re King Memorial Hosp., Inc.*, 767 F.2d at 1510 (per curiam); *In re Dalton*, 733 F.2d at 715. If the district court had gone no further than to withdraw the reference to the bankruptcy court, that decision would have been interlocutory and not appealable to the court of appeals.[4]

Resp. C.A. Br. 6, and as the court of appeals apparently assumed. The court of appeals therefore had jurisdiction under 28 U.S.C. 1291 or not at all. See *In re Powelson*, 878 F.2d 976, 979-980 (7th Cir. 1989); *In re Benny*, 791 F.2d 712, 716-719 (9th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1038 (3d Cir. 1985). This case therefore presents no occasion to decide whether the longer list of appealable items in 28 U.S.C. 158(d) ("final decisions, judgments, orders, and decrees"), as compared to the reference in 28 U.S.C. 1291 to "final decisions," enlarges the class of appealable rulings from bankruptcy courts over those that would be appealable if the district court had decided the matter itself.

[4] Respondent could have asked the district court to certify the case pursuant to 28 U.S.C. 1292(b), see *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990), slip op. 11-12, or petitioned the court of appeals for a writ of mandamus, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d at 1450-1451. But since the certification and timing prerequisites of Section 1292(b) have not been met in this case, and since no mandamus proceeding was begun in the court of appeals, these bases of jurisdiction do not bring this case "in" the court of appeals for purposes of this

3. In this case, however, the district court went on to abstain under 28 U.S.C. 1334(c).[5] The decision to abstain "end[ed] the litigation on the merits," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), and constituted a final judgment that would ordinarily be appealable under 28 U.S.C. 1291. See *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 8-10 (1983) (*Pullman* abstention decision is a "final decision" for purposes of 28 U.S.C. 1291 because party is "effectively out of court"); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2 (1962) (same). Moreover, because interlocutory rulings "merge" into a final

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Court's jurisdiction under 28 U.S.C. 1254(1). See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 745-746 (1976).

The district court's order dissolving the stay of the state court litigation, although interlocutory, would ordinarily be immediately appealable as an order "granting, continuing, modifying, refusing or dissolving [an] injunction[]," under 28 U.S.C. 1292(a)(1). If the stay order was appealable, the court of appeals might also have had jurisdiction over the district court's decisions to abstain and withdraw the reference either because the latter orders are inextricably bound up with the injunctive order, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938); *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897), or under a pendent appellate jurisdiction theory, see *San Filippo* v. *Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984) (citing cases); *Marathon Oil Co.* v. *United States*, 807 F.2d 759, 765 (9th Cir. 1986). However, since respondent did not appeal from the order dissolving the injunction, Section 1292(a)(1) cannot support the jurisdiction of the Second Circuit (or derivatively, this Court) here. More fundamentally, permitting review of district court orders dissolving stays of state court litigation would impermissibly authorize review of mandatory abstention decisions, in violation of 28 U.S.C. 1334(c)(2). In bankruptcy court, a decision to abstain necessarily includes dissolving the automatic stay of all litigation against the debtor under 11 U.S.C. 362(a) and (d)(1). By closing the front door to judicial review of the mandatory abstention decision in Section 1334(c)(2), Congress could hardly have intended to leave open the back door to review by means of Section 1292(a)(1).

[5] See App., *infra*, 3a-4a.

judgment and become reviewable at that time,[6] the district court's withdrawal of the reference became reviewable when it abstained in favor of the state court litigation.

But there is yet another procedural wrinkle. Although the district court's abstention order constituted a final decision for purposes of 28 U.S.C. 1291, jurisdiction to review that judgment (and the interlocutory order that merged into it) is limited by 28 U.S.C. 1334(c)(2). That Section provides: "Any decision to abstain made under this subsection is not reviewable by appeal or otherwise." To determine the effect of this provision, it is important to understand the two forms of abstention under Section 1334(c). As we explain below, the review bar in subsection (c)(2) applies only to mandatory abstention under that subsection, not to permissive abstention under subsection (c)(1). Although the district court invoked mandatory as well as permissive abstention in this case, subsection (c)(2) should not, in our view, be read to bar review of the condition precedent to mandatory abstention specified in that subsection. Because that condition was not met in this case, the district court's final judgment—and the withdrawal of reference that merged into it—is reviewable on appeal.

Section 1334 outlines two very different forms of abstention. Subsection (c)(1) authorizes permissive abstention. It allows a district court, in the interests of justice or comity, to abstain from hearing a proceeding "arising under title 11 or arising in or related to a case under title 11." In other words, it permits a district

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[6] See, *e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1341 (7th Cir. 1990); *J.A. Jones Constr. Co.* v. *Steel Erectors, Inc.*, 901 F.2d 943, 944 (11th Cir. 1990); *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 682-683 (7th Cir. 1990); *National Pension Fund Benefit Plan A* v. *Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir.), cert. denied, 479 U.S. 971 (1986); *Aaro, Inc.* v. *Daewoo Int'l (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985); *Dickinson* v. *Auto Center Mfg. Co.*, 733 F.2d 1092, 1101-1102 (5th Cir. 1983).

court to abstain in any case within the congressional grant of bankruptcy jurisdiction. See 28 U.S.C. 157(a), 1334(a)-(b). In contrast, subsection (c)(2) sets forth a rule of mandatory abstention. It states that a district court "shall abstain" from hearing a proceeding "related to a case under title 11 but not arising under title 11 or arising in a case under title 11," under certain circumstances.[7] The jurisdictional bar to review of abstention decisions applies only to mandatory abstention decisions, because they are the only "decision[s] to abstain made under this subsection"—that is, subsection (c)(2). By implication, therefore, permissive abstention decisions under subsection (c)(1) are reviewable as final decisions. See *In re China Peak Resort*, 847 F.2d 570, 572 (9th Cir. 1988) (holding permissive abstention decisions reviewable). See generally, *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The district court in this case abstained under subsection (c)(2) (mandatory abstention) as well as subsection (c)(1) (permissive abstention). Its oral decision relied on both subsections of the statute, Pet. App. A26, made findings regarding the conditions prerequisite to mandatory abstention, *ibid.* (only state law issues, timely adjudication available in state court, etc.), and characterized the proceeding as a "related proceeding" that did "not exist independently from Title 11 or the bankruptcy case itself," *id.* at A24-A25. The parties likewise understood the district court to have abstained under both sub-

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[7] Those circumstances are the timely motion of a party, the proceeding being based "upon a State law claim or State law cause of action," the lack of any federal jurisdictional basis other than the bankruptcy jurisdiction, and the commencement of and ability to "timely adjudicate[]" an action in state court. 28 U.S.C. 1334(c)(2).

sections of 28 U.S.C. 1334(c). See Resp. C.A. Br. 6 n.* ("The District Court also determined to abstain pursuant to 28 U.S.C. § 1334(c)(1) and (2) (A-513)."); Pet. C.A. Br. 5.

Although the district court's mandatory abstention decision is "not reviewable by appeal or otherwise" under Section 1334(c)(2), the terms of that provision do not bar review of the district court's antecedent jurisdictional determination that the proceeding is merely "related to" a case under title 11. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-352 (1976) (district court orders remanding non-civil rights case on grounds not permitted by 28 U.S.C. 1447(c) are not rendered unreviewable by 28 U.S.C. 1447(d), which provides that Section 1447(c) orders are "not reviewable on appeal or otherwise"). To the contrary, the implied reviewability of permissive abstention decisions suggests that the bar to review of mandatory abstention decisions should not be extended beyond the precise category of decisions encompassed by Section 1334(c)(2). The circuit courts to have addressed this issue have distinguished between review of the mandatory abstention decision itself, which is barred, and review of the district court's jurisdiction to order mandatory abstention, which is not barred.[8] See *In re Bobroff*, 766 F.2d 797, 800-802 & n.3 (3d Cir. 1985) (mandatory abstention under 28 U.S.C. 1334(c)(2) presupposes that case is merely "related to" bankruptcy proceeding; predicate determination is reviewable even though abstention decision is not); *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 987-989 (3d Cir. 1984) (same, under provisions of 1978 Act).

In this case, Section 1334(c)(2) does not bar review of the district court's judgment because the condition

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[8] Under this distinction, no review would be permitted of the district court's determination that a motion to abstain had been timely filed, that purely state law claims were at stake, or that the parties could timely adjudicate an action in state court. See 28 U.S.C. 1334(c)(2); note 7, *supra*.

precedent to mandatory abstention is not present. The district court assumed, see Pet. App. A24-A25, and we agree, that cases "related to" a case under title 11 (and therefore candidates for mandatory abstention under 28 U.S.C. 1334(c)(2)) roughly correspond to non-core proceedings, which 28 U.S.C. 157(c) defines as "a proceeding that is not a core proceeding but that is otherwise *related to* a case under title 11" (emphasis added). Conversely, the balance of bankruptcy jurisdiction—which encompasses "cases under title 11" and "civil proceedings arising under" or "arising in" cases under title 11, see 28 U.S.C. 1334(a) and (b)—is subject to permissive abstention. 28 U.S.C. 1334(c)(1). Although no single characteristic connects the statutory list of core proceedings, 28 U.S.C. 157(b)(1) uses the terms "arising under" and "arising in a case under title 11" in describing core proceedings. In sum, the distinction between a matter "arising under or in" a case under title 11 and a matter that is "related" to a case under title 11, appears to be essentially the same distinction as that between core and non-core proceedings. See *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987); *Central Maine Restaurant Supply* v. *Omni Hotel Management Corp.*, 73 Bankr. 1018, 1022 (D. Me. 1987); *In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 60 Bankr. 920, 929 (D.P.R. 1986); 1 *Collier on Bankruptcy* ¶ 3.01[2][b][ii], at 3-37 to 3-39 (15th rev. ed. 1990).

For the reasons stated in Point II, *infra*, the present proceeding, involving a contract entered into by the debtor-in-possession on behalf of the estate to insure the assets of the estate, clearly qualifies as a matter "arising in a case under title 11." It is therefore a core proceeding under 28 U.S.C. 157(b)(2)(A) and *not* a candidate for mandatory abstention under 28 U.S.C. 1334(c)(2). If the Court agrees that the instant case is a core proceeding, then mandatory abstention was unauthorized and no jurisdictional obstacle bars this Court's review. However, if the Court finds that this proceeding

is not core, but is merely "related to" a case under title 11, then the prerequisite for mandatory abstention has been met, and the district court's decision was not reviewable, "by appeal or otherwise," in the court of appeals. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1977) (discussing effect of bar on review of remand orders under similarly worded 28 U.S.C. 1447(d)). In that event, the Court should vacate the court of appeals' judgment and remand with instructions to dismiss the appeal for want of jurisdiction. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. at 549.

II. POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION ARE CORE PROCEEDINGS UNDER 28 U.S.C. 157(b)(2)(A)

The first question presented is whether this dispute—over a post-petition contract to insure the *res* of the bankruptcy estate—may be adjudicated in bankruptcy court as a core proceeding. As background, it is important to understand the nature of a bankruptcy court's "core" jurisdiction.[9]

1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, vests jurisdiction over bankruptcy proceedings and the debtor's property in the United States District Courts. 28 U.S.C. 1334(a), (b) and (d). The 1984 Act divides the district courts' bankruptcy jurisdiction into two categories: cases

[9] This Court's review should not be limited to the deferential "abuse of discretion" standard applicable to discretionary withdrawals of references, because the district court was not exercising its discretion in this case. To the contrary, the district court felt constrained to withdraw the reference in order to preserve petitioners' Seventh Amendment jury trial right and to comply with 28 U.S.C. 1334(c)(2)'s requirement of mandatory abstention. Pet. App. A26. On remand, the district court will remain free to withdraw the reference in an informed exercise of its discretion. See, *e.g.*, *In re Hipp, Inc.*, 895 F.2d 1503, 1514 (5th Cir. 1990); *Vreugdenhil* v. *Hoekstra*, 773 F.2d 213, 215 (8th Cir. 1985).

under title 11 and core proceedings, on the one hand, and non-core proceedings that are merely "related to" title 11 cases, on the other hand. 28 U.S.C. 157(b)-(c).

In the exercise of their jurisdiction in both core and non-core proceedings, district courts can call for assistance from adjuncts known as bankruptcy courts. Bankruptcy courts are staffed by judges appointed for a fixed term of 14 years by the United States Court of Appeals for the Circuit, and they are removable by the same authority. 28 U.S.C. 152(a) and (e). Bankruptcy courts can adjudicate only such proceedings as are referred to them by the district courts. 28 U.S.C. 157(a)-(c). Even proceedings that are core or are integral to the administration of the bankruptcy estate are not before the bankruptcy court unless the district court orders the reference. See *In re Interpictures, Inc.*, 86 Bankr. 24, 28-29 (Bankr. E.D.N.Y. 1988).

Although bankruptcy courts may participate in core and non-core proceedings, their role depends significantly on the nature of the proceeding. Bankruptcy courts may "hear and determine" core proceedings, subject to at least appellate review by the district court. 28 U.S.C. 157(b)(1). In contrast, the bankruptcy court may only submit recommended findings to the district court in non-core proceedings; absent consent of the parties, the district court must review contested non-core matters *de novo* before entering final judgment. 28 U.S.C. 157(c)(1).

The 1984 Act does not define "core" proceedings, but it does describe them as "arising under title 11, or arising in a case under title 11." 28 U.S.C. 157(b)(1). The Act also sets forth a non-exhaustive list of 15 illustrative core proceedings, including such basic matters as "allowance[s] or disallowance[s] of claims against the estate," 28 U.S.C. 157(b)(2)(B), and—of direct relevance to this case—"matters concerning the administration of the estate," 28 U.S.C. 157(b)(2)(A). The statute further provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the

basis that its resolution may be affected by State law." 28 U.S.C. 157(b)(3). The balance of the bankruptcy jurisdiction is comprised of non-core proceedings, which the 1984 Act describes as those "otherwise related to a case under title 11," 28 U.S.C. 157(c)(1).

2. Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets (unlike a suit to recover a pre-petition claim) falls within the literal wording of 28 U.S.C. 157(b)(2)(A)—"matters concerning the administration of the estate"—because the claim arose out of the administrative duties of the debtor-in-possession. Those duties are worth stating in some detail. When a debtor files for bankruptcy under Chapter 11, see 11 U.S.C. 1101-1146, as respondent did here, all of its assets are transferred to a new legal entity—the estate. See 11 U.S.C. 541(a); *In re Strangis*, 67 Bankr. 243, 245-246 (Bankr. D. Minn. 1986). At that time, the debtor becomes the "debtor-in-possession," responsible, under 11 U.S.C. 1107, for administering the estate. See *In re V. Savino Oil & Heating Co.*, 99 Bankr. 518, 524-525 (Bankr. E.D.N.Y. 1989) (at the moment of filing the debtor "assumes the mantle of a new juridical entity, a debtor-in-possession"). The bankruptcy court may subsequently appoint a trustee to administer the estate, see 11 U.S.C. 1106, but in the absence of a trustee, as in the present case, the debtor-in-possession shall, with limited exceptions, "perform all the functions and duties * * * of a trustee." 11 U.S.C. 1107(a); see Bankr. R. 9001(10); H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977) (Section 1107 "places a debtor in possession in the shoes of a trustee in every way").

The debtor-in-possession, exercising the role of the trustee, can sue and be sued on behalf of the estate, see 11 U.S.C. 323, 1107, may operate the business on behalf of the estate, 11 U.S.C. 1107, 1108, and is "considered an officer of the court subject to the supervision and control of the Bankruptcy Court and the provisions of the Bankruptcy Code," *In re V. Savino Oil & Heating Co.*, 99 Bankr. at 524; see *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951) ("reorganization trustee is the representative of

the court"); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 170 (1st Cir. 1987); *In re Beck Indus., Inc.*, 725 F.2d 880, 888 (2d Cir. 1984) (Friendly, J.); Act of July 1, 1898, ch. 541, § 1, 30 Stat. 544 (designating a trustee as an "officer").

One of the central roles of the trustee/debtor-in-possession is to preserve the *res* of the estate.[10] In the present case, the proposed bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4; J.A. A156-A157. In fulfillment of that mandate, the respondent, as debtor-in-possession, contracted on behalf of the bankruptcy estate through the insurance brokers with petitioner, The Insurance Company of the State of Pennsylvania, to insure the assets of the estate.

The efforts of a trustee or debtor-in-possession to protect and preserve the *res* of the estate by insuring its assets fit squarely within long-accepted notions of "administration of the estate."[11] Cf. *In re Hood*, 92 Bankr. 648, 651 (Bankr. E.D. Va. 1988) ("The bankruptcy court, of course, has and may exercise extensive jurisdiction over the administration and protection of the property of the estate."), aff'd, 92 Bankr. 656 (E.D. Va. 1988). If insuring the assets qualifies as "administration of the estate," then a dispute arising under an insurance contract to protect the *res*, entered into by the debtor-in-possession under the terms of the bankruptcy reorganization plan, should be considered a "matter concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Cf. *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 748 (7th Cir. 1989) (since a "policy

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[10] *In re Florida Airlines, Inc.*, 110 Bankr. 570, 572 (M.D. Fla. 1990); *In re Nautilus of New Mexico, Inc.*, 83 Bankr. 784, 789 (Bankr. D.N.M. 1988); cf. *United States ex rel. Willoughby* v. *Howard*, 302 U.S. 445, 450-452 (1938) (trustee has a fiduciary duty to care for the estate's funds).

[11] The preservation of the estate is so central to the bankruptcy proceedings that if the trustee/debtor-in-possession fails adequately to perform this task, the Code allows any "entity" to receive compensation for "administrative expenses" incurred for the "preservation of the estate." 11 U.S.C. 503(b)(1)(A).

of insurance is an asset of the estate * * *, a request to determine its validity with respect to the debtor is a 'core proceeding' "); *Aetna Cas. & Sur. Co.* v. *Gamel*, 45 Bankr. 345 (N.D.N.Y. 1984) (question whether the trustee assumed an executory insurance contract is a core matter).

3. If any doubt with respect to the proper classification of this proceeding remains, the legislative history resolves it in favor of designating it "core." As the First Circuit explained:

> [T]he legislative history of the [1984 Act] indicates that Congress intended that "core proceedings" would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. * * * They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as "Marathon-type" cases, *see, e.g., id.* [130 Cong. Rec.] at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of "a very limited kind," *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). Representative Kastenmeier said that "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," 130 Cong. Rec. E1108 (daily ed. March 20, 1984), and summary jurisdiction covered post-petition claims.

In re Arnold Print Works, Inc., 815 F.2d at 168.

4. Petitioners argue that this dispute must be considered non-core because state law provides the rule of decision. See Pet. Br. 11, 16. But that theory is belied by 28 U.S.C. 157(b). Many if not most of the core proceedings listed by Congress inevitably require the bankruptcy court to look to state law. For example, subsection (B)—"allowance or disallowance of claims"—necessarily

requires the bankruptcy court to review the validity of state law claims. Subsection (C)—"counterclaims by the estate"—inescapably includes state law counterclaims. And subsection (K)—"determinations of the validity, extent, or priority of liens"—plainly requires the bankruptcy court to adjudicate state law lien issues. The core character of a bankruptcy proceeding is not diminished by the fact that the substantive rights being adjusted are often (indeed, almost always) those created by state law. "It is the nature of the proceeding—its relation to the basic function of the bankruptcy court—not the state or federal basis for the claim, that makes the difference here." *In re Arnold Print Works, Inc.*, 815 F.2d at 169. Congress made this point explicit in the 1984 Act:

> A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. 157(b)(3).

Petitioners' contrary conclusion rests on construing the jurisdictional grants relating to core jurisdiction—"arising under title 11, or arising in a case under title 11," 28 U.S.C. 157(b)(1)—to encompass only proceedings that implicate the substantive provisions of the bankruptcy code. Pet. Br. 12-15. Perhaps "arising under title 11" could be given such a limiting construction. See *National City Bank* v. *Coopers & Lybrand*, 802 F.2d 990, 993-994 (8th Cir. 1986) ("arising under" jurisdiction reaches only claims based on a provision of title 11). But cf. *Williams* v. *Austrian*, 331 U.S. 642, 658 (1947) ("arising under" jurisdiction reaches state law disputes involving debtors in federal bankruptcy proceedings); *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934) (same). But the statute does not stop there, and "arising in a case under title 11" cannot be read to reach only those matters unique to bankruptcy. That phrase plainly includes proceedings that arise during the course of, and as a result of, the bankruptcy case. The present case falls within those terms.

5. To be sure, the provision placing matters of estate administration within the core bankruptcy jurisdiction cannot fairly be read to include actions on *pre*-petition contracts. Because no petition has been filed in the bankruptcy court, no estate has been called into being. For this reason, actions to collect on pre-petition accounts receivable—which closely resemble the proceeding at issue in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982)—cannot be core proceedings under 28 U.S.C. 157 (b) (2) (A). See *Windsor Communications Group, Inc.* v. *Grant*, 75 Bankr. 713, 721 (E.D. Pa. 1985); *In re Standard Metals Corp.*, 97 Bankr. 593, 595 (Bankr. D. Colo. 1988); 1 *Collier on Bankruptcy, supra*, ¶ 3.01 [2] [b] [iv], at 3-50.

Petitioners insist that there is no *constitutional* force to the distinction between pre- and post-petition contracts, but that contention presupposes that Article III requires all state law claims to be tried before an Article III judge. Pet. Br. 18-20. The Article III question is addressed in Point III.C., *infra*. For purposes of defining the core jurisdiction of the bankruptcy court under the 1984 Act, it suffices to note that 28 U.S.C. 157 (b) (2) (A) does draw that distinction by its reference to the "estate." Moreover, that distinction dates back at least to the 1898 bankruptcy law. See Points III.A and III.C.1, *infra*. It is therefore plausible to argue that *any* dispute that arises concerning any contract entered into post-petition by the trustee or debtor-in-possession concerns the administration of the estate. See 1 *Collier on Bankruptcy, supra*, ¶ 3.01 [2] [b] [iv], at 3-50; see also Pet. App. A12 (core jurisdiction extends to post-petition contracts under 28 U.S.C. 157 (b) (2) (A)); *In re Arnold Print Works, Inc.*, 815 F.2d at 168 ("[T]he vast majority of courts that have considered the status of similar post-petition claims have held that they were core proceedings.").[12]

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[12] The "post-petition" cases petitioner cites in support of its position that this dispute is non-core, see Pet. Br. 23-24, concern post-petition *disputes*, not post-petition *contracts*. We agree that post-petition disputes arising out of pre-petition contracts are not

But such a broad argument is unnecessary here. As the court of appeals recognized, Pet. App. A10, Congress plainly intended to include matters that are "at the heart of the administration of the bankruptcy estate" as core matters, and the present case comfortably qualifies as such a matter. Cf. *In re Standard Metals Corp.*, 97 Bankr. at 595. The instant dispute involves a contract entered into by the estate and an insurer during the pendency of the bankruptcy case. The bankruptcy reorganization plan mandated that the debtor-in-possession enter into such a contract on behalf of the estate. The fire creating the damage to the insured assets occurred before the confirmation of the bankruptcy plan. Everything regarding this dispute arose as a result of, and as part of, the bankruptcy case. Because this proceeding arose out of the bankruptcy case and "is inextricably intertwined with the administration of the case," J.A. A112, it is a core matter under 28 U.S.C. 157(b)(2)(A).[13]

III. ADJUDICATING POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION IN THE BANKRUPTCY COURT IS CONSISTENT WITH ARTICLE III AND THE SEVENTH AMENDMENT

Before reaching the question whether a jury trial in a core proceeding in bankruptcy court violates Article III or the Seventh Amendment, the Court should first determine whether petitioners are entitled to a jury trial

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core proceedings under 28 U.S.C. 157(b)(2)(A). For the reasons stated in text, however, disputes over post-petition contracts that involve estate administration are core proceedings under the literal language of Section 157(b)(2)(A).

[13] If this Court disagrees and holds that the case is a non-core proceeding, then that determination should end the inquiry on the merits. As we explained in Point I, *supra*, a finding that this case is non-core is tantamount to a determination that it is merely "related to" a case arising under title 11, and is therefore subject to the mandatory, non-reviewable abstention ordered by the district court pursuant to 28 U.S.C. 1334(c)(2).

and whether the bankruptcy court is statutorily authorized to conduct one.[14]

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[14] These issues are properly before the Court. Alhtough respondent did not cross-petition on petitioners' right to a jury trial, that issue was pressed by the parties in the court of appeals, see Resp. C.A. Br. 30-35, and passed on by the Second Circuit, see Pet. App. A17-A18. Moreover, acceptance of this argument would not enlarge or diminish the court of appeals' judgment. Because petitioners contend that a non-Article III tribunal such as a bankruptcy court cannot conduct a constitutional jury trial, Pet. Br. 43, they are no worse off having a jury trial before a decision-maker unable to conduct one (as they do under the court of appeals' judgment) than they are having no jury trial at all. The issue of petitioners' entitlement to a jury trial is therefore properly before this Court. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). Compare *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989) (declining to review question neither pressed nor passed on by court below).

The issue of statutory authority to conduct jury trials in bankruptcy court is fairly comprised within the second question presented. Determination of what the statute requires is a necessary prerequisite to determining whether the Constitution has been transgressed. Moreover, the conflict between the court of appeals' decision and the Eighth Circuit's decision in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990), is limited to the statutory authority to conduct jury trials in bankruptcy court. Petitioner reprinted the Eighth Circuit's opinion in an appendix, Pet. App. A38-A52, and sought review of that conflict in this Court, see Pet. Reply Br. 3.

In any event, the United States as intervenor should not be bound by the parties' framing of the issues in this case. Had the Attorney General been notified while this case was pending in the court of appeals, as required by Fed. R. App. P. 44 and 28 U.S.C. 2403(a), the government could have intervened and advanced the preceding arguments in defense of the constitutionality of the bankruptcy statute. The point of intervention is to "prevent constitutional or legal issues of potential significance from being decided with only limited input from private litigants, who may care little or nothing about the principles at stake." *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978).

A. Petitioners Have No Right To A Jury Trial

If a case involves "public rights," or if a party submits to the equitable jurisdiction of the bankruptcy court, then the proceedings carry no jury trial right. See *Granfinanciera, S.A.* v. *Norberg*, 109 S. Ct. 2782, 2790 n.4, 2796-2797 (1989) (no jury trial right if the case involves public rights); *id.* at 2799-2800 & n.14 (discussing the holding in *Katchen* v. *Landy*, 382 U.S. 323 (1966), that submission to the bankruptcy court's equitable summary jurisdiction waives a party's Seventh Amendment right to a jury trial). Under the 1984 Act, most core proceedings are not triable to a jury as of right because they are public rights proceedings involving traditional bankruptcy matters that are closely integrated to the federal bankruptcy scheme. Many of the remaining core matters, such as adjudication of counterclaims, 28 U.S.C. 157(b)(2)(C), likewise carry no jury trial right because they reflect the long standing principle that a party filing a claim with the estate submits itself to the equitable summary jurisdiction of the bankruptcy court. See *Katchen* v. *Landy*, 382 U.S. 323 (1966); 130 Cong. Rec. 6045-6046 (1984) (prepared statement of Rep. Kastenmeier).

1. *Petitioner Has Consented to The Bankruptcy Court's Equitable Jurisdiction*

An insurance contract dispute would ordinarily be considered a legal dispute triable to a jury as of right under the Seventh Amendment. See Pet. App. A17-A18. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, however, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Parties who knowingly contract with a trustee or debtor-in-possession "know that they are dealing with an agent responsible to a bankruptcy court." *In re Arnold Print Works, Inc.*, 815 F.2d at 170. "[T]hat the bankruptcy court would resolve sub-

sequent disputes should therefore come as no surprise." *Ibid.*

At least as far back as the 1898 Bankruptcy Act, parties who contracted with a trustee or debtor-in-possession on matters involving the administration of the estate were considered to have contracted with an officer of the court and to have subjected themselves, for purposes of the contract, to the summary jurisdiction of the adjunct bankruptcy court. See Point III.C.1, *supra; In re Arnold Print Works, Inc.*, 815 F.2d at 169-170; *In re California Eastern Airways, Inc.*, 95 F. Supp. 348, 351 (D. Del. 1951); *In re Alan Wood Steel Co.*, 1 Bankr. 167, 169 (Bankr. E.D. Pa. 1979). As the First Circuit held in 1917, by contracting with an officer of a bankruptcy estate, a company subjects itself to the summary jurisdiction of the bankruptcy court:

> * * * [T]he agreement was unmistakably made with officers of that court appointed by it in a pending bankruptcy case, and [the contract] can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court * * *. And while it remained in force, the court with whom it was so made could order it complied with * * *. *By contracting with the receivers, the company became a quasi party, instead of a stranger to the record, and subjected itself, for the purposes of the contract, to the orders of the [bankruptcy] court.*

In re Hollingsworth & Whitney Co., 242 F. 753, 756 (emphasis added; citations omitted). See also *Governor Clinton Co.* v. *Knott*, 120 F.2d 149, 153 (2d Cir. 1941) ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"); *Jackson* v. *Moore*, 348 F.2d 437, 440 (5th Cir. 1965) ("The [Bankruptcy] Court had summary jurisdiction to dispose of any controversies affecting the bankrupt estate arising out of the terms of the contract with the Trustee.").

Petitioners were not misled into thinking that they were insuring an ordinary business enterprise. Petitioners knew that respondent was executing the insurance contract not in its individual capacity, but rather in its capacity as representative of the bankruptcy estate and as an official of the bankruptcy court—*viz.*, as debtor-in-possession. Indeed, the correspondence and checks petitioners received from respondent bore the unmistakable legend "Ben Cooper, Inc., D.I.P." See note 1, *supra*. Moreover, petitioners knew the subject matter of the policy was not property of the debtor, but property of the estate. See Pet. App A12. By entering into this contract with the estate, petitioners consented to the bankruptcy court's adjudication of claims arising out of the policy without a jury trial. Cf. *Katchen* v. *Landy*, 382 U.S. 323 (1966).

In *Katchen* v. *Landy*, this Court rejected a defendant's jury trial demand because the defendant had filed a proof of claim against the estate. 382 U.S. at 336-337. As this Court recently explained, "*Katchen* makes clear * * * [that] by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Granfinanciera*, 109 S. Ct. at 2799 n.14; see *Alexander* v. *Hillman*, 296 U.S. 222, 241-252 (1935) (a party who files a claim subjects itself "to all the consequences that attach to an appearance"). Thus, a party that submits itself "to the equitable power of the bankruptcy court" allows otherwise legal claims to be adjudicated by the bankruptcy court without a jury trial. See *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1389-1390 (2d Cir. 1990); *In re Hughes-Bechtol, Inc.*, 107 Bankr. 552, 564-566 (Bankr. S.D. Ohio 1989); *In re Friedberg*, 106 Bankr. 50, 55-56 (Bankr. S.D.N.Y. 1989); cf. *CFTC* v. *Schor*, 478 U.S. 833, 852 (1986) (election of

non-Article III forum waives right to have state-law counterclaim adjudicated in Article III court).

Similarly, petitioners—by knowingly contracting with the debtor-in-possession as a representative of the bankruptcy estate to insure the assets of the estate—voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Therefore, the dispute arising under the insurance contract with the estate should be treated as an equitable proceeding that may be tried without a jury in bankruptcy court.

2. *This Dispute Involves "Public Rights" Which Are Not Triable to A Jury As Of Right*

This Court has "long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985). When federal statutory rights are involved, initial administrative adjudication is commonly and properly used to draw upon the expertise of the agency and to relieve the courts of the "serious burden" of full adjudication. *Marathon*, 458 U.S. at 80, 83 (plurality opinion); *Crowell* v. *Benson*, 285 U.S. 22, 54, 57 (1932); *United States* v. *Kras*, 409 U.S. 434, 447 (1973). Accordingly, this Court has held that if a statutory right is either closely intertwined with a federal program that Congress has power to enact, or belongs to or is asserted against the federal government, then Congress may allow a non-Article III entity to adjudicate such "public rights" with limited review by an Article III court. See *Granfinanciera*, 109 S. Ct. at 2797; *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 594. Such public rights need not be tried to a jury even if they are analogous to legal claims that would have been tried to a jury in an action at law. See *Granfinanciera*, 109 S. Ct. at 2790 n.4, 2796-2797; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977).

The exact contours of what qualifies as a public right remain unclear, but guidance can be found in *Thomas* v. *Union Carbide Agricultural Products Co.*, *supra*. In *Thomas*, this Court held that Congress could, consistent with Article III, direct that disputes arising among participants in the pesticide registration scheme established by FIFRA (the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*) be resolved by binding arbitration with only limited review available in an Article III court. The Court observed that the FIFRA scheme bore many of the characteristics of a "public" right because the registration system is an integral part of a program safeguarding the public health. 473 U.S. at 589. The Court concluded: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Id.* at 593-594.

This Court has expressly held that public rights cases need not directly involve the United States as a party. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 589-594. Moreover, in *Marathon*, the plurality presumed that in a bankruptcy case disputes concerning the adjustment of the debtor-creditor relationship at the core of the bankruptcy power are public rights. *Marathon*, 458 U.S. at 71 (plurality opinion). Recently, in *Granfinanciera*, the Court reaffirmed *Thomas*'s holding that public rights disputes are not restricted to suits between citizens and the federal government, but include seemingly private disputes if closely integrated into a public regulatory scheme. *Granfinanciera*, 109 S. Ct. at 2797.[16]

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[16] While this Court has expressly rejected the proposition that Congress's power to assign matters to a non-Article III forum is limited to matters where the federal government is a party to the dispute, see *Thomas*, 473 U.S. at 585-586, 594, whether the federal government is a party to the proceedings nonetheless remains a

In determining whether the present dispute involves public rights, the critical focus should be on whether the dispute "is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Thomas*, 473 U.S. at 594. As a first step there must be a "public regulatory scheme."

The federal bankruptcy system is just such a program. It was constituted by Congress through exercise of its Article I power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, Cl. 4; see *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989). This Court has long recognized the broad power vested in Congress by the Constitution to establish a federal bankruptcy scheme. See *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 191-196 (1819) (Marshall, C.J.). Over time, Congress has expanded its exercise of this constitutional authority in order to address manifest public problems. Notably, the first bankruptcy act, and every expansion thereafter before the most recent revisions, followed a major or minor depression. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 581-582 n.11 (1935); C. Warren, *Bankruptcy in United States History* (1935). These extensions of the federal bankruptcy scheme have been deemed "funda-

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relevant factor. The federal government's participation as a party is strong evidence that the proceedings involve public rights which may be adjudicated in the first instance by a non-Article III entity. Thus, it is notable that the executive branch is technically a party to every bankruptcy case via the participation of the United States Trustee. The United States Trustees are officers of the executive branch who "represent the public interest" in every bankruptcy case. *In re Revco, D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990); see H.R. Rep. No. 595, 95th Cong., 1st Sess. 109 (1977); Pearson and FitzSimon, *The Role of the United States Trustee*, (pt. 2) 1990-No. 7 Norton Bankruptcy Law Adviser 1 (July 1990). Indeed, the United States Trustee's interests and involvement in bankruptcy matters allow him the right to appeal, even though he has no monetary stake in the proceedings. *In re Revco*, 898 F.2d at 500.

mental and radically progressive [in] nature," and "far reaching." *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 671 (1935). At the same time, these expansions merely constitute "extensions into a field [of constitutional authority] whose boundaries may not yet be fully revealed." *Ibid.*

The current federal bankruptcy scheme provides a unitary federal forum for administration and dispute resolution. This forum facilitates the orderly discharge of indebtedness, equitable distribution of the estate, and rehabilitation of the debtor. Absent a comprehensive federal bankruptcy scheme, ordinary economic forces would frustrate orderly distribution to creditors and preclude rehabilitation.[16] In short, the federal bankruptcy scheme confers a public benefit and implicates the public interest in a way that ordinary suits between private litigants do not. See *Page* v. *Edmunds*, 187 U.S. 596, 605 (1903); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 192 (1902). Thus, the federal bankruptcy system should be considered a "public regulatory scheme" under *Thomas*.

The second inquiry under *Thomas* is whether the specific proceeding at issue is "so closely integrated" to the federal scheme that it should be regarded as involving public rights. The fact that a dispute involves state

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[16] Traditional rights and remedies are inadequate in the context of a bankruptcy because an insolvent by definition has insufficient assets to cover his liabilities, thus precipitating an undesirable rush to judgment and execution that rewards the quickest and most aggressive creditors, perhaps by payment in full, while leaving those less quick or more tolerant to recover nothing. Rehabilitation is impossible where creditors are panicked into desperate efforts to exercise their traditional remedies of execution and foreclosure. Litigation is haphazard and spread out over multiple jurisdictions. The federal bankruptcy scheme protects the debtor from the exercise of traditional creditor remedies by giving a breathing space to enable either a rational liquidation or rehabilitation benefitting both the debtor and creditors and, in the case of a business enterprise, the debtor's employees, customers, suppliers, and owners. See *In re Elcona Homes Corp.*, 863 F.2d 483, 484 (7th Cir. 1988); T. Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

law does not mean that it is not integrally related to the federal scheme. In both *Thomas* and *CFTC* v. *Schor*, 478 U.S. at 850-856, this Court found that although the proceedings at issue involved state law they still should be considered integrally related to a federal scheme. In the bankruptcy context, this Court has presumed that disputes concerning the adjustment of the debtor-creditor relationship (that is, the process of allowance and disallowance of claims), although involving state law, should nonetheless be deemed matters concerning public rights. See *Marathon*, 458 U.S. at 71 (plurality opinion); see also 130 Cong. Rec. 6047 (1984) (prepared statement of Rep. Kastenmeier) ("State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. * * * Indeed the very purpose of bankruptcy is to modify the rights of debtors and creditors.").

But public rights proceedings in bankrupcy should not be limited to the process of allowing and disallowing claims. Other proceedings are also integral to the operation of the federal bankruptcy scheme. For example, disputes regarding the estate's relationship with professional fiduciaries, who are employed to maintain, preserve, and protect the estate, are at the heart of the operation of the federal scheme, even though such disputes often involve state law. Surely, a fee or malpractice dispute between the estate and the trustee or other professionals hired by the estate (*e.g.*, attorneys and accountants) must be subject to adjudication by the bankruptcy court as a matter integrally related to the administration of the estate. See *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 267-268 (1941) ("Under Ch. X of the Chandler Act the bankruptcy court [which included the referee] has plenary power to review all fees and expenses in connection with the reorganization.").

As we explained in Point II, *supra*, this core proceeding involves a post-petition contract to insure the *res* of

the estate and must likewise be considered integrally related to the administration of the estate. See *Governor Clinton Co.* v. *Knott*, 120 F.2d at 153 ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"). The bankruptcy scheme creates the legal entity the "estate," 11 U.S.C. 541(a), and requires the bankruptcy trustee (or, in the present case, the debtor-in-possession) to preserve and protect the estate. As explained above, see p. 20, *supra*, that task is central to the administration of the estate. In the present case, in performance of this essential role, the debtor-in-possession contracted, on behalf of the estate, to insure the assets of the estate. Because of the importance of preserving the *res* of the estate, the bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4.

Under these circumstances, the post-petition insurance of the assets of the estate should be considered integral to the administration of this estate and thus to the federal bankruptcy scheme. Hence, any dispute regarding an insurance policy entered into by an officer of the court to protect the estate is itself a matter involving public rights.[17]

B. *The Bankruptcy Statute Does Not Authorize Jury Trials in Bankruptcy Court*

If the Court disagrees with the foregoing and concludes that petitioners are entitled to a jury trial, the Court must then determine whether the 1984 Act authorizes jury trials in bankruptcy court.

The 1984 Act is silent on the question. Cf. *Granfinanciera*, 109 S. Ct. at 2790-2791 n.3. The Second Circuit

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[17] The fraudulent conveyance action at issue in *Granfinanciera* is quite different. Prior to the 1984 Act, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy." 109 S. Ct. at 2794 (quoting *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)); accord *id.* at 2798.

inferred the existence of such statutory authority based on Congress's general intent to allow bankruptcy courts to enter final judgments in all core proceedings. Pet. App. A19. The Eighth and Tenth Circuits have recently rejected that analysis. See *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990). They held instead that Congress's silence, the absence of any tradition of jury trials in bankruptcy court, and the "serious constitutional problems posed" by an interpretation that would imply such authority, all counseled against such an interpretation. *In re United Missouri Bank*, 901 F.2d at 1455-1457; *In re Kaiser Steel Corp.*, No. 90-1031 (10th Cir. Aug. 10, 1990), slip op. 20-23. We submit that the Eighth and Tenth Circuits reached the correct result.

1. The 1984 Act does not by its terms authorize or forbid jury trials in bankruptcy court, as a brief survey of the statutory text and legislative history reveals. The only language in the Act addressing "the right to trial by jury" appears in 28 U.S.C. 1411:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

This Court has characterized Section 1411 as "notoriously ambiguous" and the legislative history accompanying it as "confused." *Granfinanciera*, 109 S. Ct. at 2789 n.2. What little legislative history exists suggests that Congress was concerned that tort victims' right to a jury trial before the district court in personal injury and wrongful death cases not be lost simply because defendants filed for bankruptcy. See 130 Cong. Rec. 20,228 (1984) (remarks of Rep. Kastenmeier) ("in this narrow range of [personal injury and tort] cases the parties do not lose any right to a jury trial"); 130 Cong. Rec.

20,081 (1984) (remarks of Sen. Thurmond) (Section 1411 provides "that this chapter of title 28 and title 11 do not affect a right to trial by jury * * * with regard to a personal injury or wrongful death tort claim"). This reading of Section 1411 is consistent with 28 U.S.C. 157, which designates personal injury and wrongful death claims as non-core proceedings, 28 U.S.C. 157(b)(2)(B), which are to be tried by a jury before a district court, 28 U.S.C. 157(b)(5). See 130 Cong. Rec. 20,226 (1984) (remarks of Rep. Fish); *id.* at 20,228 (remarks of Rep. Hall).

2. The provision for jury trials in tort cases in the district court does not answer the question whether Congress intended jury trials in bankruptcy court. On the one hand, one might argue that Congress intended all jury trials except for those in tort cases to occur in bankruptcy court. On the other hand, one might argue that Section 1411(b) manifests the Legislature's intention that only the district court, not the bankruptcy court, preside over jury trials. The question in this case, then, is which way the statutory silence cuts. For three reasons, we believe that Congress's silence counsels against authorizing jury trials in bankruptcy court.

First, the 1984 Act reconstituted bankruptcy judges as adjuncts on the model of the United States Magistrates. See, *e.g.*, 130 Cong. Rec. 20,227 (1984) (statement of Rep. Kastenmeier) ("[T]he bill we passed provided that bankruptcy judges shall serve as adjuncts of the Federal district court. * * * These two features were the heart of the House-passed bill. Both of these features have been retained in conference."). Congress was well aware that this Court had approvingly described the constitutional status of magistrates as that of "adjuncts" to the district courts. *Marathon*, 458 U.S. at 77, 79 (plurality opinion); *United States* v. *Raddatz*, 447 U.S. 667, 682, 683 (1980). Magistrates are expressly authorized by statute to conduct jury trials in civil cases when the parties consent. 28 U.S.C. 636(c)(1); see also 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401(a)-(b) (authorizing magistrates to conduct certain criminal misdemeanor trials, including jury trials). By contrast,

bankruptcy judges lack comparable statutory authority. Given the similar adjunct status shared by magistrates and bankruptcy judges, and the use of the magistrate system as a model for the bankruptcy reference system established by the 1984 Act, it is highly unlikely that Congress would have explicitly granted jury trial authority to magistrates and have made no such explicit grant to bankruptcy judges if it intended them both to conduct jury trials. Cf. *Gomez* v. *United States*, 109 S. Ct. 2237, 2242-2246 (1989) (strictly construing "other duties" which magistrates may be assigned).

Second, the Bankruptcy Reform Act of 1978 vested in the bankruptcy courts jurisdiction over all civil actions arising under title 11 or arising in or related to such cases. 28 U.S.C. 1471(b)-(c) (repealed 1984). The broad grant of jurisdiction, combined with 28 U.S.C. 1480, which preserved the parties' rights to jury trials, made unmistakable Congress's intention to hold jury trials in the bankruptcy court. See *Marathon*, 458 U.S. at 55 ("Congress has allowed bankruptcy judges the power to hold jury trials."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 12 (1977) ("Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits.'").

When it enacted the 1984 Act, however, Congress deleted both Sections of the 1978 Act that had been construed to authorize jury trials in bankruptcy court. Thus, while 28 U.S.C. 1411(b)'s predecessor under the 1978 Act (former 28 U.S.C. 1480(b)) allowed the "bankruptcy court" to hold jury trials, the current provision permits only "[t]he district court," to order issues arising under 11 U.S.C. 303 (regarding involuntary petitions) to be tried without a jury. The change from "bankruptcy court" to "district court" in the 1984 Act evidences Congress's intent to have the district court, rather than the bankruptcy court, preside over jury trials.[18]

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[18] Further evidence that Congress did not intend bankruptcy courts to conduct jury trials is provided by Part (d)(1)(D) of the Emergency Rule adopted by the Judicial Conference. That

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Third, Congress's broader purpose in the 1984 Act was to curtail the independent authority of bankruptcy judges, among which was the power to preside over jury trials. In passing the 1984 Act, Congress's main objective was to create a bankruptcy court scheme which would avoid the constitutional pitfalls exposed by *Marathon*. See *In re Wood*, 825 F.2d at 95. The *Marathon* Court found that the 1978 Act vested the essential attributes of judicial power in the bankruptcy court, specifically relying on the fact that under the 1978 Act bankruptcy courts could "exercise all ordinary power of district courts, *including the power to preside over jury trials.*" 458 U.S. at 84-85 (emphasis added) (plurality opinion).

In reaction to *Marathon*, Congress carefully placed the "judicial power" over bankruptcy matters in the district court, thus ensuring that the "essential attributes" of judicial power were retained in an Article III court. Compare S. Rep. No. 55, 98th Cong., 1st Sess. 36-37 (1983), with *Marathon*, 458 U.S. at 77-81 (plurality opinion). That is to say, Congress vested all bankruptcy jurisdiction in the district court, not the bankruptcy court. 28 U.S.C. 1334. Only if the district court decides to refer bankruptcy matters to the bankruptcy court does the bankruptcy court have any power. 28 U.S.C. 157(a). And, even if the district court refers a case, the bankruptcy court may enter final judgment only on core matters, subject to district court appellate review. 28 U.S.C. 157(b). Even then, the district court may by rule or order restrict the bankruptcy court's statutory authority. 28 U.S.C. 151. At all times, the district court re-

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provision clearly stated that "bankruptcy judges may not * * * conduct jury trials." The significance of the Judicial Conference's provision is that the 1984 Act is "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating. * * * The only changes contemplated by our amendment are to add the endorsement of the Congress to the emergency rule * * *." 130 Cong. Rec. 6242 (1984) (statement of Rep. Kindness).

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tains power to withdraw any or all proceedings from the bankruptcy court. 28 U.S.C. 157(d).

What appears from the 1984 statute is that Congress carefully avoided cloaking the bankruptcy court with too much judicial authority. Where Congress did provide the bankruptcy court with judicial authority, it did so in a limited sense and it did so expressly. In view of this statutory scheme, and Congress's clear intent to avoid a bankruptcy court that would amount to "an unwarranted encroachment" into the province of the Article III judiciary, it is unreasonable to infer from statutory silence that Congress granted bankruptcy judges the power to preside over jury trials. See *In re Kaiser Steel Corp.*, slip op. 21-23; *In re United Missouri Bank*, 901 F.2d at 1456. That inference is simply inconsistent with Congress's express goal of limiting the juridical authority of bankruptcy judges.[19]

C. A Bankruptcy Court May Conduct A Jury Trial Consistent With Article III And The Seventh Amendment

Although the 1984 Act does not authorize bankruptcy judges to preside over jury trials, such statutory authority would be constitutional.

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[19] The arguments in text indicate that Congress did not confer statutory authority to conduct jury trials on bankruptcy courts, whether the proceeding is core or non-core. If the proceeding is non-core, an additional obstacle stands in the way of construing the 1984 Act to authorize jury trials in bankruptcy court. The review provision governing non-core proceedings provides that the district court must review "de novo those matters to which any party has timely and specifically objected." 28 U.S.C. 157(c)(1). Reading that Section in light of the Seventh Amendment's Re-examination Clause—as one would have to do if bankruptcy judges could preside over jury trials in non-core proceedings—the word "matters" would have to mean different things in bench and jury trials. The awkwardness of that construction is evidence that jury trials in non-core proceedings cannot take place in bankruptcy court.

1. *Holding Jury Trials In Bankruptcy Court Does Not Violate Article III*

The court of appeals below correctly observed that "[*i*]*f* bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22 (emphasis added). The reason is clear. If bankruptcy judges can conduct bench trials consistent with Article III, then the presence of a jury weakens rather than strengthens the Article III challenge. The principal Article III concern is that the political branches might inappropriately influence adjudicators who lack life tenure and salary protection. See *Marathon*, 458 U.S. at 60 (plurality opinion). Jurors, unlike judges, are not dependent on the government for their offices and therefore are not susceptible to pressure from that source. It follows that if bankruptcy courts can adjudicate claims in bench trials consistent with Article III, that Article does not bar them from holding jury trials.[20]

We therefore return to the issue this Court faced in *Marathon*—whether petitioners are entitled to litigate their claims in an Article III court. *Marathon* held, in brief, that Congress could not constitutionally invest a non-Article III officer with power to hear a pre-petition state contract action only peripherally related to the bankruptcy case. 458 U.S. at 84 (plurality opinion); *id.* at 90 (Rehnquist and O'Connor, JJ., concurring in the judgment).[21] Four crucial differences dictate a different outcome here.

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[20] Cf. *Fields* v. *Washington Metro. Area Transit Auth.*, 743 F.2d 890, 891, 894 (D.C. Cir. 1984) (upholding against Article III challenge jury verdict in trial presided over by magistrate); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1038, 1045 (7th Cir. 1984) (same); *Collins* v. *Foreman*, 729 F.2d 108, 110, 114-120 (2d Cir. 1984) (same); *Goldstein* v. *Kelleher*, 728 F.2d 32, 34 (1st Cir. 1984) (same); *Williams* v. *Mussomelli*, 722 F.2d 1130, 1132 (3d Cir. 1983) (same).

[21] Because *Marathon* had no majority opinion, the only "clear holding" is the limited view expressed in the concurring opinion.

[Continued]

First, the 1984 Act constituting the bankruptcy courts differs materially from the 1978 legislation challenged in *Marathon*. The *Marathon* plurality compared unfavorably the bankruptcy system established by the 1978 Act with the 1898 Act which preceded it. See 458 U.S. at 79 n.31. The 1984 Act removes the objectionable features of the 1978 Act and adopts many aspects of the old referee system of which the plurality spoke approvingly. The current legislation should therefore pass constitutional muster even under the *Marathon* plurality's exacting scrutiny.

Bankruptcy referees under the 1898 Act were adjuncts of the district court. *Marathon*, 458 U.S. at 79-80 n.31 (plurality opinion) ("bankruptcy referees were appointed and removable only by the district court * * * [a]nd the district court retained control over the reference by his power to withdraw the case from the referee"). Under the referee system, the Article III requirement of an independent judiciary was ensured, because "even at the trial stage, the parties had access to an independent judicial officer." 458 U.S. at 79-80 n.31.

The plurality's favorable description of the old referee system supports the constitutionality of the 1984 Act. Whereas the executive branch appointed bankruptcy judges who exercised jurisdiction over bankruptcy matters in the 1978 Act, Article III judges now appoint and remove bankruptcy judges. 28 U.S.C. 152. And whereas the bankruptcy courts themselves exercised the bankruptcy jurisdiction and were virtually independent of the United States District Courts under the 1978 Act, 458 U.S. at 79-80 n.31, the district courts alone exercise jurisdiction over bankruptcy matters under the 1984 Act, 28 U.S.C. 151, 157, 1334. By law, bankruptcy judges are today merely "unit[s]" of the district court. 28 U.S.C. 151. The district courts exercising the bankruptcy jurisdiction now have power to refer some, all, or no bank-

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[21] [Continued]

White Motor Corp. v. *Citibank, N.A.*, 704 F.2d 254, 260 (6th Cir. 1983); see also *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); *id.* at 94 n.2 (White, J., dissenting).

ruptcy proceedings to the bankruptcy court;[22] to withdraw a bankruptcy case at any time in their discretion, 28 U.S.C. 157(a) and (d);[23] and to exercise exclusive jurisdiction over withdrawn cases to the exclusion of the bankruptcy courts.[24] As the court of appeals observed in *In re Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990): "[W]e are unsure even that today's bankruptcy courts are 'courts' in a generic sense not defined by Article III." *Id.* at 1514. "[T]oday's bankruptcy courts are arguably at least as much like magistrates or even administrative agencies as they are like other non-Article III courts," *id.* at 1515.

In sum, the 1984 Act largely returned the bankruptcy judges to their previous role as adjuncts of the district courts. *In re Bertoli*, 812 F.2d 136, 139 (3d Cir. 1987). To paraphrase the *Marathon* plurality, bankruptcy litigants under the 1984 Act have access to an independent judicial officer even at the trial stage. Cf. *Marathon*, 458 U.S. at 79 n.31 (plurality opinion). Given the substantial degree of control and supervision of the district courts, statutory authority allowing bankruptcy judges to preside over jury trials in a very limited number of core matters poses no threat to the Article III judiciary. See *In re Mankin*, 823 F.2d 1296, 1308-1310 (9th Cir. 1987); see also *Olympia Hotels Corp.* v. *Johnson Wax*

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[22] See *In re Interpictures, Inc.*, 86 Bankr. at 28-29 (even "core" matters do not have to be referred to the bankruptcy court).

[23] See, *e.g.*, *Ameritel Corp.* v. *Isoetec Communications, Inc.*, 109 Bankr. 965, 967-68 (D. Or. 1990) (withdrawing a core matter); *In re A.H. Robins Co.*, 88 Bankr. 742, 743 (E.D. Va. 1988) (withdrawing entire Chapter 11 case on day petition filed), aff'd, 880 F.2d 694 (4th Cir. 1989); *In re American Community Servs., Inc.*, 86 Bankr. 681 (D. Utah 1988) (withdrawing adversary proceeding a year and a half after complaint filed); *Danning* v. *Lummis (In re Tom Carter Enterprises, Inc.)*, 44 Bankr. 605, 609 (C.D. Cal. 1984) (excepting only *final* decisions of the bankruptcy judge from withdrawal power); see also 1 *Collier on Bankruptcy*, *supra*, ¶ 3.0-[2][e], at 3-63.

[24] See *UNR Indus., Inc.* v. *Continental Ins. Co.*, 101 Bankr. 524, 526 (N.D. Ill. 1989) (bankruptcy court has no power to grant or withhold approval of a settlement of a withdrawn adversary claim).

Dev. Corp., 908 F.2d 1363, 1368 (7th Cir. 1990) (suggesting that a bankruptcy judge could preside over trials on core matters). The dictates of Article III are accordingly satisfied even under the view of the *Marathon* plurality.

Second, petitioner's *post*-petition dispute in this case stands on a different constitutional footing from the *pre*-petition contract dispute in *Marathon*. As the First Circuit stated, post-petition contracts fell within the summary jurisdiction of the bankruptcy court under the 1898 Act:

> If one examines the jurisdictional history of post-petition claims of the sort in issue here, one finds that they are not "traditional contract actions"; nor are they matters that "historically" have been decided only in the equivalent of Article III courts. To the contrary, bankruptcy courts have adjudicated claims like this one at least since the enactment of the Bankruptcy Act of 1898. Indeed, they have done so in exercise of "summary jurisdiction"—a jurisdiction permitting the bankruptcy court to sit as a court in equity, deciding without a jury matters that a jury might have decided had a party pressed the same claim in a state court.

In re Arnold Print Works, Inc., 815 F.2d at 169. The First Circuit observed that post-petition contracts with an officer of the bankruptcy court (either the trustee or, as here, the debtor-in-possession) were "treated as contracts with the court itself" by which act the contracting party "*subjects himself for the purposes of the contract to the summary jurisdiction of the court.*" 815 F.2d at 170 (emphasis in original; citation omitted). The First Circuit concluded that "the history of bankruptcy court jurisdiction means that a post-petition contract made with a debtor-in-possession cannot be called a 'traditional' state contract action." 815 F.2d at 170; see Point III.A, *supra* (summarizing other authority upholding summary jurisdiction over post-petition disputes in bankruptcy courts).

Petitioner nonetheless insists that Article III should not be understood to distinguish between pre- and post-petition contracts because both involve state law claims.

Pet. Br. 18-20. But even though state law is implicated in both cases, the timing and the relationship of the dispute to the administration of the estate make a critical constitutional difference between pre- and post-petition contractual disputes. Moreover, this Court has not embraced the principle that all state law claims may be tried only in Article III courts (if they are to be adjudicated before a federal tribunal), and it could not adopt petitioner's principle without ruling *ultra vires* the actions of innumerable administrative agencies, see, *e.g.*, *CFTC* v. *Schor*, 478 U.S. at 851-857 (upholding CFTC's jurisdiction over state law counterclaims); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 583; *Crowell* v. *Benson*, 285 U.S. at 51, and legislative courts such as the courts for the territories and the District of Columbia, see *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 407 (1973); Pet. App. A22, all of which daily adjudicate "private rights" and none of whose judges enjoys life tenure or salary protection. Nearly a century of adjudicating post-petition disputes in non-Article III bankruptcy courts is persuasive evidence that no Article III adjudicator is required.

Third, the need is overwhelming for adjunct bankruptcy judges to have power to enter final judgment on core matters referred to them by district courts. In 1989, 642,993 bankruptcy petitions were filed, and the pending caseload rose to an all-time high of 879,340 petitions. See *Annual Report of the Director of the Administrative Office of the United States Courts* 26-27 (1989). On July 1, 1988, 90,018 adversary proceedings were pending under the bankruptcy code, and during the next year more than 50,000 additional proceedings were filed. *Id.* at 366. If district courts cannot refer bankruptcy proceedings to adjunct bankruptcy courts, Congress could provide a unitary federal bankruptcy forum only by demanding a greater than 50% increase in the efficiency of the district courts (the 575 district judges would have to absorb the workload of 296 bankruptcy judges, see *id.* at 45-46), or, alternatively, Congress could add 296 Article III judgeships, see *ibid.*, which would at one stroke increase the number

of Article III judges by 41%. The first alternative is administratively hopeless; the second jeopardizes the carefully-nurtured institution of Article III judges—"a small group of revered, elite generalists, entrusted with enormous powers of constitutional governance over the other branches and the sovereign states." Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233, 261 (1989). In sum, the threat to the Article III judiciary as we know it is not that the current bankruptcy judges perform Article III tasks, but that the Article III judges might have to perform the chores now handled by the bankruptcy judges.

Fourth, the absence of any threat to the Judiciary is clarified by this Court's decisions since *Marathon*. "In cases specifically involving the Judicial Branch," this Court has been "vigilan[t] against two dangers:

> first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' *Morrison* v. *Olson*, 487 U.S. [654, 680 (1988)], and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S., at 851."

Mistretta v. *United States*, 488 U.S. 361, 383 (1989). The provisions of the 1984 Bankruptcy Act present neither danger.

Petitioners do not contend that the 1984 Act burdens the Judiciary with any work it is unsuited to perform. To the contrary, they argue that the 1984 Act withdraws from the superintendence of Article III judges matters that are solely within their provenance. That withdrawal is purportedly accomplished by the provision for appellate-style review in district courts of final decisions entered by bankruptcy courts in core proceedings. See Pet. Br. i, 45.

The 1984 Act does not limit district courts to appellate review of final decisions of bankruptcy courts. The provision in 28 U.S.C. 157(b)(1) that "[b]ankruptcy judges

may hear and determine" core proceedings must be read together with 28 U.S.C. 151, which provides that such authority may be exercised "except as otherwise provided by * * * rule or order of the district court." The latter provision permits the district court to retain *de novo* review over all proceedings referred to the bankruptcy court, even core proceedings. In effect, the 1984 Act merely permits district courts to exercise appellate review over final decisions of bankruptcy courts. That relaxation of otherwise total control over adjunct bankruptcy courts is not mandatory. It mistakes a power for a constraint to say that this provision threatens the institutional integrity of the Judiciary. As in *United States* v. *Raddatz*, 447 U.S. 667 (1980), where this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion, "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685 (Blackmun, J., concurring).

In addition, "clear error" review of final decisions rendered by bankruptcy courts in core proceedings would not insulate the bankruptcy courts from superintendence by the Article III Judiciary. In *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 498-499 (1984), this Court addressed an analogous conflict between the clear error review prescribed by Federal Rule of Civil Procedure 52(a) and the obligation of appellate courts to undertake an independent examination of the whole record in public figure libel cases. This Court observed that "[t]he conflict between the two rules is in some respects more apparent than real," *id.* at 499, because clear error review permits review of the whole record and because the degree of deference to the trial court's findings depends on whether the evidence is testimonial or documentary, whether the trial is long or short, and

whether the inferences drawn are strong or weak, *id.* at 500-501. Although the *Bose* Court concluded that the First Amendment "assigns to judges a constitutional responsibility that cannot be delegated," *id.* at 501, no precedent of this Court incorporates a similar standard in Article III.

Furthermore, appellate review in an Article III court is a sufficient exercise of "the judicial power" to satisfy that Article. Article III does not require that courts staffed by life-tenured judges protected against salary reduction themselves adjudicate from start to finish all cases within the federal judicial competence. The Framers' omission of any requirement that Congress establish federal trial courts makes that point clear; indeed, the lower federal courts did not enjoy federal question jurisdiction until 1875, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Article III thus invites the holding that "the Constitution gives Congress wide discretion to assign the task of making the initial decision in a case arising under federal law to administrative agencies, but requires judicial review to assure the supremacy of law." Bator, *supra*, 65 Ind. L.J. at 269; see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 226-229.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court made clear that Article III is satisfied when an administrative agency's decision is subject to review in an Article III Court to ensure that it is consistent with law —*i.e.*, that the agency has properly construed and applied the applicable law and that the evidence is sufficient as a matter of law. The Court stated that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. Accordingly, the Court held that a non-Article III agency could make factual determinations under a workers' compensation act. *Id.* at 60-61. By the same token, this Court customarily exercises its original jurisdiction

by appointing special masters who need not be Article III judges, and the Court "regularly acts on the basis of the master's report and exceptions thereto." *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980).

In this troubled and complex area, this Court should uphold, if possible, the attempt by Congress and the President—co-equal branches both, and sworn to uphold the same Constitution—to mark the line between valid and invalid grants of authority.

2. *The Seventh Amendment Does Not Require An Article III Judge to Preside Over A Jury Trial*

Allowing a bankruptcy judge to preside over a jury trial in a core proceeding would not violate a party's Seventh Amendment right. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment issue may be divided into two questions: whether a bankruptcy judge can preside over a jury trial, and whether the district court's review violates the Re-examination Clause.

a. The court of appeals below did not address the question whether a bankruptcy judge can conduct a jury trial. The earliest precedent of this Court bearing on the question appears to be *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899). In that case, the Court held that Congress could provide a jury trial on an appeal taken to an Article III court from a verdict in a jury trial presided over by a District of Columbia justice of the peace. The Supreme Court upheld the statute by holding that the first jury trial was not a Seventh Amendment jury trial, so that the jury trial on appeal (which was before an Article III court and so clearly was a Seventh Amendment jury trial) did not violate the Re-examination Clause. 174 U.S. at 45. Moreover, the Court ruled that

a justice of the peace, alternatively described as a magistrate, *id.* at 18, 31, could not superintend and direct a jury trial within the intendment of the Seventh Amendment. *Id.* at 14-16, 18, 38-39, 43, 45. The Court explained that the superintendence and direction of the jury was part of the Seventh Amendment right, *id.* at 15-16, and that the D.C. justice of the peace did not have the requisite authority, *id.* at 38-39.

Although *Hof* implies that no adjudicator with powers conferred solely by Congress could have sufficient authority to conduct a jury trial guaranteed by the Seventh Amendment, see 174 U.S. at 17, 38-39, this Court rejected the "broad" reading of *Hof* in *Pernell* v. *Southall Realty*, 416 U.S. 363, 380 (1974). The *Pernell* Court held that English justices of the peace presided over jury trials that were "jury trial[s] in the full constitutional sense." *Ibid.* That English justices of the peace were required to be learned in the law, were members of courts of record, and employed procedures similar to those followed in the common law courts sufficed for Seventh Amendment purposes. *Ibid.* Read together, *Hof* and *Pernell* suggest that a sufficiently "judicial" Article I judge may preside over a jury trial consistent with the Seventh Amendment. This conclusion is further supported by the fact that Article I judges of the District of Columbia courts preside over Seventh Amendment jury trials every day, and this Court has never questioned that practice. See 416 U.S. at 367. As one commentator concludes: "Bankruptcy judges, like the *Pernell* superior court judges and unlike the *Hof* justices of the peace, are judges presiding over courts of record. They possess the legal training and ability to instruct jurors on the law, advise them concerning the facts, and set aside inappropriate verdicts. The seventh amendment thus appears to pose no constitutional obstacle to jury trials conducted by bankruptcy judges." Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1037-1038 (1988) (footnotes omitted).

b. The court of appeals did address the Re-examination Clause issue—*i.e.*, whether district court review of jury trials conducted in bankruptcy court would violate the Seventh Amendment. It summarily rejected the argument, pointing out that "[s]ince the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment." Pet. App. A21. The court of appeals' analysis is correct. Section 158 of Title 28 does not require a district court to subject a jury verdict in a core proceeding to review any more stringent than what would be applied by an appellate court. Moreover, the Seventh Amendment expressly permits "re-examination" of a jury verdict "according to the rules of the common law." Appellate review of a jury verdict rendered in a core proceeding would thus not violate the Re-examination Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

2. 28 U.S.C. 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13, of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334 (c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C. 1334 provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but

not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 28 U.S.C. 1411 provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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